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In the Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Cases:

	Page
Pacific Northwest Generating Cooperative v. *Brown*, 25 F.3d 1443, amended and superseded by 38 F.3d 1058 (9th Cir. 1994)	7
Palila v. *Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988)	4, 5
Rust v. *Sullivan*, 500 U.S. 173 (1991)	3
Seattle Audubon Soc'y v. *Espy*, Civ. No. 92-479WD (W.D. Wash. Dec. 21, 1994)	5, 6
TVA v. *Hill*, 437 U.S. 153 (1978)	5
United States v. *Hayashi*, 22 F.3d 859 (9th Cir. 1993)	6, 7
United States v. *Salerno*, 481 U.S. 739 (1987)	3

Statutes and regulation:

Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*:	
§ 7, 16 U.S.C. 1536	7
§ 7(b)(4)(B), 16 U.S.C. 1536(b)(4)(B)	7
§ 9, 16 U.S.C. 1538	2, 7
§ 9(a)(1), 16 U.S.C. 1538(a)(1)	1, 2
§ 10, 16 U.S.C. 1539	8
§ 10(a)(1)(B), 16 U.S.C. 1539(a)(1)(B)	3
§ 11(b), 16 U.S.C. 1540(b)	2
§ 11(g)(1)(A), 16 U.S.C. 1540(g)(1)(A)	8
Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*	6
50 C.F.R. 216.3	6

Miscellaneous:

H.R. Rep. No. 412, 93d Cong., 1st Sess. (1973)	4
S. Rep. No. 307, 93d Cong., 1st Sess. (1973)	4

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Respondents' challenge to the Fish and Wildlife Service's "harm" regulation under the Endangered Species Act is premised on two incorrect assertions. First, respondents erroneously maintain (Br. in Opp. 8, 10) that the "take" prohibition (which includes the prohibition against "harming" a listed species) in Section 9(a)(1) of the Act is limited to actions "directed against wildlife," and that it does not prohibit "ordinary" land use even when that use causes death or significant injury to listed species. Second, respondents contend (Br. in Opp. 8-10) that the "harm" regulation is facially invalid because it extends to actions other than those "directed against wildlife," *i.e.*, that the regulation is "overbroad in every application" inasmuch as it applies to an

"innocent" use of land that has the unintended effect of injuring listed wildlife.

1. a. With regard to respondents' construction of the "take" prohibition in Section 9(a)(1) of the Act, 16 U.S.C. 1538(a)(1), it is not altogether clear what respondents mean by "directed against wildlife" or "ordinary" land use. See Br. in Opp. 8, 10; see also *id.* at 3, 4, 5, 9, 11, 15.[1] Moreover, respondents' interpretation appears to differ from the court of appeals' interpretation of the Act's "take" prohibition as applying only to a "direct application of force." Pet. App. 4a, 5a.

What is clear, however, is that both those statutory interpretations are incorrect. Section 9 of the Act forbids any person from "taking" an endangered species, regardless of whether the taking is the primary purpose of the person's actions. The taking of a listed species through an unintentional killing or wounding violates the Act. The court of appeals recognized that "[t]he trapping of a nonendangered animal, for example, may incidentally trap an endangered species," and poses the problem of an incidental take (Pet. App. 11a)—a take that *is* prohibited by the Act, but that may not give rise to civil or criminal penalties if the actor obtained an

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[1] Respondents' adoption of the "directed against" terminology, combined with their emphasis on the actor's purpose, suggests an implausible standard that requires proof in civil (as well as criminal) cases of an actor's subjective purpose and intent actually to kill or significantly injure an endangered species. The statutory language defining "take" does not address the actor's state of mind. Respondents confuse the act itself with the *mens rea* required for criminal liability. The court of appeals recognized that imposition of criminal penalties under the "take" prohibition requires a scienter element that is specified by the Act. Pet. App. 6a, citing 16 U.S.C. 1540(b) ("knowingly violate"). Respondents, however, ignore that element in the criminal penalties provision of the Act and instead erroneously contend that the scienter issue should be addressed by restricting the scope of activities that constitute a "take" in the first place.

Respondents' repeated references to "ordinary" land use are without any concrete content and are not rooted in the text or purposes of the Endangered Species Act or the administrative and judicial interpretations of the Act.

incidental take permit that covered his trapping activity.[2] If, as respondents suggest, the Act bans only purposeful takes, there would have been no need for Congress to amend the Act in 1982 to provide for a permit allowing incidental takes. See Pet. 16-17.

b. Respondents also err in asserting that the regulation is "overbroad in every application," and therefore facially invalid, because it applies to unintended "takes." The "harm" regulation is not applicable only to actions that result in the unintended death or significant injury of a listed species. It is aimed at activities that are intended to kill or injure wildlife as well. In fact, respondents in essence concede that habitat modifications for the purpose of eliminating listed wildlife from a site do constitute unlawful "takes," although they discount such violations as "theoretical." Br. in Opp. 9.

Despite respondents' attempt to dismiss the argument about the facial nature of their challenge as an argument "lead[ing] nowhere," they concede, as they must, that such a challenge raises "conceptual difficulties." Br. in Opp. 8. Indeed, this Court has emphasized the heavy burden parties must meet to succeed in a facial challenge. See *Rust* v. *Sullivan*, 500 U.S. 173, 183 (1991), quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

2. Respondents selectively emphasize portions of the 1973 legislative history in an effort to support their argument that Congress intended a narrow interpretation of "take" to exclude any injury or death to species resulting from significant habitat modification or degradation. Respondents ignore, however, those portions that undercut their argument. For example, in quoting a Senate report, respondents omit (Br. in Opp. 14 n.13) the following emphasized language:

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[2] An incidental take permit may be issued where a "taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B).

"'Take' is defined * * * *in the broadest possible manner* to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973) (emphasis added). Respondents also ignore the House report's explanation that "take" includes the activities of birdwatchers where "the *effect* of those activities might disturb the birds and make it difficult for them to hatch or raise their young." H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973) (emphasis added). The latter passage demonstrates that Congress's concern was with the impact of activities on species, not with the intentions of the actor.[3] It also demonstrates that Congress intended to encompass actions that adversely affect behavioral patterns, not just those that cause bodily pain.

Respondents do not address the 1982 amendments to the Endangered Species Act other than to refer (Br. in Opp. 15 n.13) to Judge Williams's discussion (Pet. App. 10a-24a) and to Judge Mikva's statement (*id.* at 39a) that the amendments alone do not define the contours of the "take" definition. As we show in the petition (Pet. 16-17), however, the enactment in 1982 of a process for obtaining an exemption for incidental takes evidences the reasonableness of the Secretary's interpretation, because the exemption provision was established in response to circumstances involving (and despite comments criticizing) the "harm" regulation's application to habitat modification activities.

3. Respondents contend (Br. in Opp. 16-17) that no conflict among the circuits exists because the Ninth Circuit's conclusion in *Palila* v. *Hawaii Dep't of Land & Natural Resources* (*Palila II*), 852 F.2d 1106, 1108-1109 (9th Cir. 1988),

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[3] Since it almost always could be claimed that the intended purpose of an activity included something other than the foreseeable death of, or significant injury to, an endangered species, respondents' interpretation would eviscerate the "take" prohibition by making it virtually unenforceable.

that the "harm" regulation's inclusion of habitat destruction follows the plain language of the statute and conforms to congressional intent is dictum. Specifically, respondents contend that the conclusion is dictum because the state defendant in *Palila II* did not argue that the "harm" regulation's application to habitat modification activities was altogether invalid. The State of Hawaii did, however, unsuccessfully argue in *Palila II* that "harm" could not include habitat modification that could result in extinction of the species by future interference with essential behavioral patterns. Respondents' attempt to distinguish actions that "indirectly" cause harm from those that "directly" do so echoes the argument that was rejected in *Palila II*.[4] In short, both appellate decisions cannot be correct: The decision below holds that no application of the regulation to habitat modification activities is valid, whereas *Palila II* holds that the regulation is valid as applied to an action that would cause the extinction of an endangered species by destroying its habitat.[5]

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[4] If the Secretary's interpretation of "harm" in the case of the indirect effects on an endangered species resulting from destruction of its food source comports with congressional intent, as the Ninth Circuit held in *Palila II*, then that holding dictates the validity of the "harm" regulation in instances in which the habitat modification more directly and immediately causes death or injury, such as the alteration of a water body that provides the sole habitat for an entire species. See *TVA* v. *Hill*, 437 U.S. 153, 184 n.30 (1978).

[5] The existence of a circuit conflict is confirmed by a recent district court decision in the Ninth Circuit that discusses the two cases. *Seattle Audubon Soc'y* v. *Espy*, Civ. No. 92-479WD (W.D. Wash. Dec. 21, 1994). We discussed that case in the certiorari petition (Pet. 24-25) in connection with our explanation of how the decision below threatens to cause significant disruptions to federal actions. As an example, we pointed to the then-still pending case, in which environmental groups challenged the President's proposed plan to permit the lifting of the injunctions banning timber harvests on federal lands within the range of the northern spotted owl throughout the Pacific Northwest. See *ibid.* The plaintiffs in the *Seattle Audubon* case alleged that the underlying environmental documents were inadequate because they assumed that private landowners' activities that "harm" protected species may be circumscribed, but, according to the

Respondents fare no better in their attempt to explain away the reasoning in *Palila II* by reference to subsequent Ninth Circuit decisions. *United States* v. *Hayashi*, 22 F.3d 859 (9th Cir. 1993), addressed whether particular conduct violated a regulation that defines actions that constitute an unlawful "take" under the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.* (MMPA).[6] Respondents' suggestion (Br. in Opp. 17) that *Hayashi* somehow marks a retreat from *Palila II* is contradicted by the Ninth Circuit's statement that the "harm" regulation, issued under the Endangered Species Act, "is not the controlling regulatory definition and is an improper starting point for any MMPA prosecution." 22 F.3d at 864; see also *id.* at 862. Specifically, the issue in *Hayashi* was whether a fisherman's firing of a rifle in order to scare porpoises away from his fishing lines constituted a criminal "take" by "harassment" under the MMPA regulations. *Id.* at 861. In holding that it did not, the court reasoned that the fisherman's action did not disrupt normal behavioral patterns because feeding from a fishing line is not part of porpoises' normal eating habits. *Id.* at 864-865. The court also regarded the disruption to be of sufficiently short duration

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plaintiffs, that assumption was inconsistent with the decision of the D.C. Circuit in the instant case. In its December 21, 1994, ruling, the district court upheld the government's plan. The district court noted that the D.C. Circuit's ruling in the instant case is not binding in the Ninth Circuit and that a contrary conclusion had already been reached by the Ninth Circuit in *Palila II*, which held that the "harm" regulation is valid. The district court reasoned that *Palila II* is the law of the Ninth Circuit unless changed by the Ninth Circuit itself or by this Court. See slip op. 34-37.

6 That regulation, 50 C.F.R. 216.3, is different from the one at issue here. Section 216.3 defines "take" under the MMPA as including:

> The collection of dead animals, or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and feeding or attempting to feed a marine mammal in the wild.

and consistent with the regulatory feeding prohibition, so that it did not have a significant impact on the species. *Ibid.*

Respondents mischaracterize *Pacific Northwest Generating Cooperative* v. *Brown*, 25 F.3d 1443, 1452, amended and superseded by 38 F.3d 1058 (9th Cir. 1994), by asserting (Br. in Opp. 17) that it held that an inadvertent killing of listed salmon while fishing is not a "take" under the Endangered Species Act. The issue in that case was not whether a "take" occurred; rather, it was whether the undisputed "take" of listed species properly could be authorized by a Section 7 "incidental" take statement issued in conjunction with an approval of the harvest of nonlisted species. See 16 U.S.C. 1536(b)(4)(B). In other words, the question was whether the "take" of the listed salmon was in fact "incidental" as opposed to the intended purpose of the federally authorized action.[7] The Ninth Circuit held that the federal agencies properly treated the "take" of listed species, which was an inevitable byproduct of the harvest of nonlisted species, as an "incidental" take that was eligible for exemption from the Section 9 prohibition pursuant to an incidental take statement issued under Section 7 of the Act. Thus, *Pacific Northwest Generating Cooperative* in no way undermines the holding in *Palila II*.[8]

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[7] The plaintiffs in *Pacific Northwest Generating Cooperative* were power companies that sought a total ban on all commercial fish harvests in the belief that such a ban would lessen the restrictions that had been imposed on power generation in order to protect listed species. To that end, the plaintiffs argued that the National Marine Fisheries Service in the Department of Commerce violated the Endangered Species Act by issuing a Section 7 incidental take statement for the taking of listed salmon in conjunction with the harvest of nonlisted salmon. The plaintiffs reasoned that because the purpose of the authorized action was to catch fish, the "take" of listed species was not "incidental" within the meaning of Section 7(b)(4)(B), 16 U.S.C. 1536(b)(4)(B), and, therefore, that the federal approval of the fish harvest should be enjoined.

[8] Contrary to respondents' suggestion (Br. in Opp. 17), there is no reason to believe that the Ninth Circuit will revisit the "harm" regulation's validity in a pending case, *Forest Conservation Council* v. *Rosboro Lumber*

The circuit conflict created by the decision below should be resolved by this Court. Because the D.C. Circuit can exercise jurisdiction in a manner that overlaps with the geographic jurisdiction of other courts of appeals, the conflict presented here is immediately and unusually disruptive. See Pet. 22-23. In addition, that jurisdictional arrangement may frustrate further development of the issue in other courts of appeals.

4. Finally, respondents suggest (Br. in Opp. 18) that the Court should not grant review because invalidation of the "harm" regulation would not have any significant impact on endangered species or on the Section 10 permit program because, they assert, expense and delay have resulted in infrequent invocation of the permit process. Contrary to respondents' assertion, however, the submission of 150 applications for Section 10 permits (see Pet. 24 & n.22) evidences substantial voluntary participation, particularly since most of the applications have been submitted in recent years. Moreover, as we show in the petition (Pet. 24), voluntary compliance is also accomplished by special rules or by project modifications developed in consultation with the Fish and Wildlife Service to avoid altogether any incidental "take" of a listed species.

Co., No. 94-35070. The principal issue in that case is whether the citizen suit provision, 16 U.S.C. 1540(g)(1)(A), authorizes a district court to enjoin completion of a project that would, if completed, "take" a listed species. The district court held that it did not have such authority, and that the suit had been prematurely filed. A secondary issue relates to the type of evidence required to establish a "take." On appeal, the defendants-appellees have challenged the validity of the "harm" regulation and argued that the Ninth Circuit should follow the D.C. Circuit's decision below. See Defendants-Appellees' Br. 4-18. The plaintiffs-appellants have responded by arguing that the issue may not be raised for the first time on appeal and that neither the plaintiffs-appellants nor the Ninth Circuit is bound by the D.C. Circuit's decision. See Plaintiffs-Appellants' Reply Br. 1-6. The defendants-appellees did not request an en banc hearing, as would be required to overturn a prior Ninth Circuit panel holding. In this procedural posture, the Ninth Circuit should have no occasion to address the validity of the "harm" regulation.

Abandonment of the "harm" regulation would mark a fundamental change in the approach to species protection that has governed during the entire 20-year period that the Endangered Species Act has been in effect—an approach that was affirmed and implemented by Congress in the 1982 amendments. Respondents do not deny that preservation of habitat is essential to the survival of most endangered species. Respondents therefore are wrong in suggesting that there is nothing remarkable or consequential in the court of appeals' invalidation of the Secretary's longstanding interpretation of the Act.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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